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No. 08-1478

In the Supreme Court of the United States

HUSAIN RAFIK KURJI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in denying petitioner's petition for review, which challenged the Board of Immigration Appeals' decision not to reopen his removal proceedings *sua sponte*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted in 306 Fed. Appx. 129. The decision of the Board of Immigration Appeals (Pet. App. 4a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. The petition for a writ of certiorari was filed on April 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245 of the Immigration and Nationality Act (INA), 8 U.S.C. 1255, provides that the Attorney General may, in his or her discretion, adjust the status

of certain aliens to that of a lawful permanent resident.[1] As relevant here, an alien who is physically present in the United States as of December 21, 2000, and is the beneficiary of an approved application for labor certification filed on or before April 30, 2001, may apply to the Attorney General for adjustment of status. 8 U.S.C. 1255(i). Several prerequisities must be met, including that the alien must be "eligible to receive an immigrant visa," be "admissible to the United States for permanent residence," and have "an immigrant visa * * * immediately available to" him. 8 U.S.C. 1255(i)(2).

Even if all of the statutory prerequisities are met, adjustment is not automatic. "The grant of an application for adjustment of status under section 245 [8 U.S.C. 1255] is a matter of administrative grace," and the applicant "has the burden of showing that discretion should be exercised in his favor." *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980). Whether a particular applicant warrants a favorable exercise of discretion is a case-specific determination that depends upon whether the applicant has demonstrated that any adverse factors present in his application are "offset * * * by a showing of unusual or even outstanding equities." *In re Arai*, 13 I. & N. Dec. 494, 495-496 (B.I.A. 1970).

b. The Board of Immigration Appeals (Board) may reopen any proceedings in which it has previously entered a decision. 8 U.S.C. 1229a(c)(7). An alien may file a motion to reopen removal proceedings based on previously unavailable, material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). The Board shall not grant the motion to reopen "unless it appears to the

[1] The reference to the Attorney General in Section 1255(i) also encompasses the Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1517, 116 Stat. 2311.

Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 1003.2(c)(1). An alien may file only one such motion to reopen, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The Board has broad discretion in adjudicating a motion to reopen, and it may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a); see *INS* v. *Doherty*, 502 U.S. 314, 323 (1992).

If an alien does not file his motion to reopen within the 90-day time period, the Board may reopen his case *sua sponte*. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. Petitioner is a native and citizen of India. Pet. App. 1a. He was admitted to the United States in December 1999 as a non-immigrant visitor and remained in the United States beyond the time authorized. Administrative Record (A.R.) 142. On August 23, 2002, the former Immigration and Naturalization Service charged

him with being removable as an alien who overstayed his visa. A.R. 142, 354-355; see 8 U.S.C. 1227(a)(1)(B).

Petitioner conceded that he was removable as charged and sought withholding of removal, protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, and voluntary departure. A.R. 142-143, 160-161, 170-171.[2] Petitioner claimed that, if he returned to India, he would be persecuted or tortured because he is Muslim. A.R. 143. An immigration judge (IJ) held a hearing, at which petitioner was the only witness. A.R. 167-206.

The IJ determined that petitioner was removable as charged, denied his claims for withholding of removal and CAT protection, and denied his request for voluntary departure. A.R. 142-152. Petitioner had testified that he was arrested by the police once or twice in 1997 or 1998; that he was beaten up by five or six Hindus on several occasions; and that, when he attempted to file a complaint with the police, the police would not accept his complaint. A.R. 143-145. After recounting petitioner's testimony, the IJ made an adverse credibility finding, observing that petitioner's testimony was "inconsistent with his application for [withholding of removal], internally inconsistent, vague, implausible, and not supported by documents which should have been readily available and should have been presented." A.R. 146. The IJ explained that petitioner's testimony about when he was

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[2] Contrary to the assertion in his petition (Pet. 6-7), petitioner did not seek asylum. As his attorney explained to the immigration judge, petitioner only sought withholding of removal and CAT protection because an asylum application would have been untimely under the one-year bar in 8 U.S.C. 1158(a)(2)(B). See A.R. 170-171.

arrested appeared to be "deliberately vague" and was "so equivocal as to be beyond belief"; that petitioner did not present any documents to corroborate his claimed injuries; and that petitioner gave conflicting accounts of the same events, so that "it appeared that [petitioner] was making up his story as he went along." A.R. 146-148. The IJ found it particularly troubling that petitioner presented "no travel documents or identity documents to establish his identity." A.R. 147.

Even if petitioner's testimony were credible, the IJ determined, his claims for withholding of removal and CAT protection failed on their merits because petitioner failed to show a likelihood of persecution or torture. A.R. 149-150. And the IJ denied petitioner's request for voluntary departure, explaining that he was ineligible for that benefit because he could not establish his identity. A.R. 150. The IJ therefore ordered petitioner removed to India. A.R. 151.

3. The Board affirmed the IJ's decision without a separate opinion, making it the final agency decision. Pet. Supp. App. 1a; see 8 C.F.R. 1003.1(e)(4). Petitioner filed a motion to reconsider, which the Board denied. Pet. Supp. App. 2a-3a. The Board explained that "the Immigration Judge's thorough and well-reasoned decision sets forth many specific reasons for his adverse credibility determination"—which petitioner "failed to challenge * * * on appeal"—and held that there was "no error of fact or law in [its] prior decision." *Ibid.*

4. The court of appeals denied petitioner's petitions for review of the Board's decisions in an unpublished, per curiam decision. *Kurji* v. *Gonzales*, 140 Fed. Appx. 549 (5th Cir. 2005). The court determined that the IJ's adverse credibility finding was supported by substantial evidence, because "the IJ provided many cogent reasons

for finding that [petitioner] was not credible," which were "amply supported by the record," and it rejected petitioner's various claims of procedural error. *Id.* at 549-550.

5. Almost three years after he was ordered removed, petitioner filed a motion to reopen his proceedings with the Board. A.R. 51-78. He sought reopening in order to apply for adjustment of status because an application for labor certification filed on his behalf recently had been approved. A.R. 52-60.

The Board denied petitioner's motion to reopen. Pet. App. 4a-5a. The Board explained that "[a] motion to reopen in any case previously the subject of a final decision by the Board must be filed no later than 90 days after the date of that decision." *Id.* at 4a (citing 8 C.F.R. 1003.2(c)(2)). Applying that rule, the Board determined that petitioner's motion to reopen was "filed almost 3 years late." *Id.* at 5a. The Board also declined to exercise its *sua sponte* reopening authority to permit consideration of petitioner's application for adjustment of status, because petitioner failed to demonstrate that this case presented an "exceptional situation" warranting such relief. *Ibid.*

Petitioner filed a petition for review of the Board's decision with the court of appeals. He also filed a motion to reconsider with the Board, contending that he was not required to abide by the 90-day filing deadline for his motion to reopen because he had not become eligible to adjust his status until recently. A.R. 10-12.

The Board denied the motion to reconsider. A.R. 2. It explained: "Becoming eligible for relief from removal after a final administrative order has been entered, and after the time allowed for filing a motion to reopen has elapsed, is common and does not, in itself, constitute an

exceptional circumstance warranting [the Board's] consideration of an untimely motion." *Ibid.* A contrary holding, the Board explained, would "vitiate the statutory and regulatory deadlines, which are designed to bring finality to immigration proceedings." *Ibid.*

Petitioner filed a petition for review of the Board's denial of his motion for reconsideration, which the court of appeals consolidated with his then-pending petition for review of the Board's denial of reopening.

6. The court of appeals denied the consolidated petitions for review in an unpublished, per curiam decision. Pet. App. 1a-3a. The court observed that petitioner's motion to reopen was untimely, so that his proceedings could only be reopened if the Board exercised its *sua sponte* reopening authority. *Id.* at 2a. The court then explained that it could not review the Board's decision not to invoke that authority here, because it "does not have jurisdiction to consider the [Board's] refusal to sua sponte reopen [petitioner's] proceedings." *Ibid.* (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)).

The court also rejected petitioner's arguments that the Board "did not give sufficient reasons for its denial of his motion to reopen" and that the denial of reopening violated his due process rights, explaining that the Board's reasons were adequate and that petitioner had no liberty interest at stake in his motion to reopen. Pet. App. 2a. Finally, the court rejected petitioner's assertion that 8 U.S.C. 1255(i)'s authorization for certain aliens to seek adjustment of status "trump[s]" the statutory and regulatory time limitation for the filing of a motion to reopen, explaining that petitioner "abandoned" that issue by "fail[ing] to brief" it. Pet. App. 3a.

ARGUMENT

Petitioner seeks review (Pet. 8-20) of the court of appeals' denial of his petition for review, which challenged the Board's denial of *sua sponte* reopening. In particular, he contends (Pet. i, 15) that three provisions of the INA—8 U.S.C. 1255(i), 8 U.S.C. 1229a, and 8 U.S.C. 1252(a)(2)(B)(ii)—are "fundamentally conflicting" because 8 U.S.C. 1255(i) authorizes certain aliens to apply for adjustment of status, but 8 U.S.C. 1229a requires that an alien file any motion to reopen to seek adjustment of status within 90 days of entry of a final order of removal, and 8 U.S.C. 1252(a)(2)(B)(ii) limits judicial review of certain discretionary determinations by the Board.

Petitioner failed to brief that issue to the court of appeals, and the court of appeals found it had been abandoned. Moreover, petitioner failed to present that argument to the Board, which means that the federal courts lack jurisdiction to review it. In any event, there is no disagreement in the courts of appeals on the issue petitioner attempts to present, and the court of appeals' decision is correct. Further review therefore is unwarranted.

1. The certiorari petition should be denied because petitioner did not brief the issue upon which he seeks review to the court of appeals or the Board. As the court of appeals explained, although petitioner asserted in passing that 8 U.S.C. 1255(i) "'may' trump" the time limitations for reopening contained in 8 C.F.R. 1003.2(c)(2), petitioner "failed to brief this issue, and thus he has abandoned it." Pet. App. 3a; see Pet. 20 (acknowledging that "perhaps" he should have presented

the issue more "sharply" to the court of appeals).[3] As a result, the court did not consider the issue. This Court ordinarily does not address issues that were not passed upon by the courts below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); see also *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted).

Not only did petitioner fail to brief the issue before the court of appeals, but he did not present it to the Board either. As a result, the federal courts lack jurisdiction to consider it. See 8 U.S.C. 1252(d)(1) (courts cannot consider claims an alien failed to exhaust before the agency). Petitioner offers no explanation for his failure to present the issue below, and this Court therefore should not depart from its ordinary practice and reach out to consider the issue in the first instance.

2. Contrary to petitioner's contention (Pet. 8-15), there is no circuit conflict on the question petitioner attempts to present. As an initial matter, the unpublished and fact-bound decision below does not establish binding circuit precedent and it therefore could not give rise to a circuit conflict of the sort that might warrant this Court's review even if the court had addressed the merits of petitioner's claim.

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[3] Although petitioner filed two briefs with the court of appeals, the only mention of the issue upon which he seeks review is the following passing assertion, which appeared in a supplemental brief: "Petitioner's reliance on § 245(i) of the LIFE Act (2000) may even trump bars under 8 C.F.R. § 1003.2(c)(2), transforming motions to reopen into a statutory *rather than* regulatory right for aliens. Thus the petitioner's outcome also raises concerns under the Constitution's Equal Protection and Due Process Clause as well." Pet. Supp. C.A. Br. 8 (2008 WL 5972266); see generally Pet. C.A. Br. 5-9 (2008 WL 5972265) (argument section).

In any event, petitioner has not identified any court of appeals that has considered—let alone accepted—the argument that the 90-day time limitation contained in 8 U.S.C. 1229a(c) and 8 C.F.R. 1003.2(c)(2) does not apply when aliens seek adjustment of status under 8 U.S.C. 1255(i). To the contrary, he appears to acknowledge that no court of appeals has addressed the argument. See Pet. 16 ("Generally the Circuit courts have not faced head on this issue."); see also Pet. 6. The cases petitioner cites (Pet. 8-9, 12-15) as evidence of a circuit conflict address when a continuance should be granted, in a case still pending before the IJ, to permit the alien to seek adjustment of status.[4] But petitioner never sought to continue his removal proceedings in order to pursue adjustment of status, and he readily acknowledges that he "may not equate [his] case with the continuance cases" because his case concerns a denial of *sua sponte* reopening, which "no court in the land" has found reviewable, Pet. 15; see p. 11, *infra*, rather than a continuance denial.

3. The court of appeals' decision is correct. The relevant statute and regulation clearly provide that a motion to reopen "must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened."

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[4] Petitioner also cites (Pet. 13-14) *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 249-250 (5th Cir. 2004), and *Zhao* v. *Gonzales*, 404 F.3d 295, 303 n.6 (5th Cir. 2005). But *Enriquez-Alvarado* holds that the courts of appeals lack jurisdiction to review the Board's denial of *sua sponte* reopening, and every circuit that has considered that issue has agreed. See p. 11, *infra*. And *Zhao* addresses whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of denials of motions to reopen; that question is not presented here because this case concerns *sua sponte* reopening. See pp. 12-13, *infra*.

8 C.F.R. 1003.2(c)(2); see 8 U.S.C. 1229a(c)(7)(C). That rule is subject to limited exceptions, see 8 U.S.C. 1229a(c)(7)(C)(iv); 8 C.F.R. 1003.2(c)(3), but petitioner does not contend that any of them applies here. Petitioner filed his motion to reopen almost three years late; accordingly, his proceedings could only be reopened if the Board exercised its *sua sponte* reopening authority. Pet. App. 2a.

The court of appeals correctly held that it could not review the Board's denial of *sua sponte* reopening. The unanimous view of the courts of appeals is that such a claim is unreviewable because *sua sponte* reopening is committed to agency discretion by law, see 5 U.S.C. 701(a)(2), and there are no judicially manageable standards for reviewing such a decision, see, *e.g.*, *Tamenut* v. *Mukasey*, 521 F.3d 1000, 1003-1004 (8th Cir. 2008) (en banc) (per curiam) (agreeing with ten other courts of appeals). Petitioner acknowledges that there is no disagreement in the circuits on this point. See Pet. 15; see also Pet. 11-12.

Moreover, there is no merit to petitioner's argument that the time limitation for filing a motion to reopen must yield when an alien seeks to adjust his status under 8 U.S.C. 1255(i). For a number of years, the immigration laws have contained a time limitation for filing a motion to reopen. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-593 (enacting 8 U.S.C. 1229a(c)(6) (Supp. II 1996) (current version at 8 U.S.C. 1229a(c)(7)); 61 Fed. Reg. 18,901, 18,905 (1996) (8 C.F.R. 3.2(c)(2) (1997)). That limitation helps to further the interest in the finality of removal proceedings and to ensure that aliens illegally present in the United States do not use motions to re-

open to prolong their stay. See, *e.g.*, *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2315 (2008); *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). Nothing in 8 U.S.C. 1255(i) purports to override that congressional judgment. Section 1255(i) does not afford every eligible alien a right to adjust his status; it affords an alien the opportunity to adjust his status, which is subject to the discretion of the Attorney General or Secretary of Homeland Security. See, *e.g.*, *In re Patel*, 17 I. & N. Dec. 597, 601 (1980). There is therefore no basis to conclude that Section 1255(i) "trumps" the time limitation for filing a motion to reopen.

4. The petition need not be held for this Court's decision in *Kucana* v. *Holder*, cert. granted, No. 08-911 (oral argument scheduled for Nov. 10, 2009). The question presented in *Kucana* is whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the Board of Immigration Appeals' denial of an alien's motion to reopen his immigration proceedings. Pet. at i, *Kucana* v. *Holder*, *supra* (No. 08-911). *Kucana* is not relevant to this case because the court of appeals did not rely on (or even mention) Section 1252(a)(2)(B)(ii) in its decision. Pet. App. 2a. Instead, the court of appeals determined that it lacked jurisdiction to review the Board's denial of *sua sponte* reopening because that action is committed to the agency's discretion by law. See *ibid.* (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (holding that, because the regulation regarding *sua sponte* reopening "gives an IJ or the [Board] complete discretion to deny untimely motions to reopen, the reviewing court has no legal standard by which to judge the IJ's ruling, and therefore the court lacks jurisdiction")). Indeed, petitioner never even mentioned Section 1252(a)(2)(B)(ii) to the court of appeals. Accord-

ingly, it is extremely unlikely that *Kucana* would have any bearing on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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